

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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THE UNITED STATES OF AMERICA,  
ex rel,

Plaintiffs,

Civil Action  
No. 16-cv-12182-FDS

v.

December 20, 2021

JANSSEN BIOTECH, INC.,

Defendant.

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Pages 1 to 55

TRANSCRIPT OF HEARING VIA ZOOM VIDEOCONFERENCE  
BEFORE THE HONORABLE M. PAGE KELLEY  
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

(The following proceedings were held via Zoom videoconference before the Honorable M. Page Kelley, United States Magistrate Judge, United States District Court, District of Massachusetts, December 20, 2021.)

THE CLERK: Today is Monday, December 20, 2021, and we are on the record in civil case number 16-cv-12182, The United States of America, ex rel, versus Janssen Biotech, Inc. The Honorable M. Page Kelley presiding.

Would counsel please identify themselves for the record.

MR. LEOPOLD: Good morning again, Your Honor. Ted Leopold on behalf of the relator along with Casey Preston, Leslie Kroeger and Diana Martin.

THE COURT: Good morning to all of you.

MR. POSNER: Good morning, Your Honor. Ethan Posner, Covington & Burling, along with Kristen Cobb, Sarah Tremont and Stacey Grigsby. Good morning.

THE COURT: Good morning. All right. So I'm appearing remotely from outside the courthouse because they were having fire drills in the courthouse today, and I didn't want to get interrupted. My connection has not been the greatest, but hopefully we'll make it through this hearing. We're here on two motions, number 218, which is the relator's motion to reconsider discovery rulings. And then number 223,

1 which has to do with additional discovery in the privilege  
2 log. I'll hear you first on number 218, Mr. Leopold or  
3 whoever is prepared to argue that.

4 MR. LEOPOLD: Yes, Your Honor. Again good morning.  
5 There is a lot of issues sort of on the table. So I want to  
6 try and do this in the most economic way. Is there a  
7 particular way you want us to handle these various issues or  
8 just take one at a time?

9 THE COURT: I agree with you there's a lot of  
10 ground to cover today. If we can't cover it all, I'm happy  
11 to regroup another day. I know you have your hearing before  
12 Judge Saylor on the 22nd, and he wants to go forward with  
13 that. I just actually spoke to him this morning about these  
14 pending motions, and he knows what's happening. He still  
15 wants to have that status with you, but I think he'll just  
16 continue having periodic statuses.

17 I don't want to do this in a rushed way. I know  
18 that there's quite a lot you're asking for. Why don't we  
19 work our way through the first motion, number 218. I'll try  
20 to put on the docket what we can resolve today. And  
21 hopefully we'll get through both motions. I am going to ask,  
22 because I think it may have some relevance to what we're  
23 talking about today, has any progress been made on the advice  
24 of counsel defense? Maybe I'll ask Mr. Posner that.

25 MR. POSNER: Well, I think we are prepared to

1 advise the relator's counsel on December 21 of our  
2 intentions. So yes.

3 THE COURT: So by tomorrow. And is that going to  
4 impact the issue about the privilege log, etc.?

5 MR. POSNER: I don't think so. I'm not 100 percent  
6 sure, but I don't think so.

7 THE COURT: So I'll just hear you, Mr. Leopold.  
8 Let's start with 218. I know you want more custodians. I'm  
9 not really inclined to give you 28 more, but I will give you  
10 several more. I wonder if you can just give me a brief  
11 overview of that.

12 MR. LEOPOLD: Yes, Your Honor, I can. I think a  
13 lot of these issues sort of dovetail with one another.  
14 Starting with the custodian-related issues, it's a little bit  
15 of a Catch-22, candidly, from our position and I think from  
16 Janssen's position. So just historically from a background,  
17 as I think Your Honor can appreciate, I must say, in my  
18 experience at least, this is the first time in my experience  
19 the defense concept as they set forth in this particular  
20 case, which is arguing that we're limited on the number of  
21 custodians.

22 We have been limited in terms of getting those  
23 particular relevant people. We were out of the box not given  
24 relevant names. We did not get sort of the main players  
25 until much later down the road. And at that time that is

1 when we came back, Your Honor, and Your Honor gave us a few  
2 more custodians. But unlike what normally happens in a Rule  
3 26 disclosure, the defendant usually has the duty and  
4 obligations to give those relevant individuals names up front  
5 so we know who from a material and relevancy standpoint would  
6 be those custodians. We didn't have that. Number one.

7 Number two, this is also the first experience that  
8 I have had where the defendants have admitted there are  
9 relevant, numerous relevant individuals who were involved  
10 going back to 1998, 1999, when these programs started, a  
11 number of individuals would be relevant and material to  
12 obtain and at least get documents from.

13 Number two, under the rules we all know that a  
14 defendant or any party has a duty, an obligation in good  
15 faith, to put a hold and search for documents where they  
16 would reasonably be located. The defendants have stated that  
17 they did not do that here. What the defendants stated is  
18 under ESI go to these few handful of custodians. And we  
19 think that those were for the most part where the most  
20 material documents would lie. But they didn't search all the  
21 other places where reasonable documents would be located.

22 Even though we are first in phase one, now we're in  
23 phase two. It's a national program in scope. So there are  
24 relevant material substantive witnesses that they have never  
25 searched for, documents that would be relevant. They have

1 limited their search to documents to those custodians which  
2 we have been limited to ascertain materials from.

3 Number one, they say although there are, quote  
4 unquote, corporate documents that they have searched for, but  
5 we know from their own materials and documents and statements  
6 that the attorneys on behalf of Janssen stated, there are  
7 numerous numerous other people who have relevant material  
8 documents. We just didn't have the obligation to search for  
9 them. There are probably over 100 people that would have  
10 relevant material. We are not seeking that. We think the 28  
11 or so record custodians, if you will, are substantive people  
12 that would be able to have relevant documents. The  
13 defendant's past arguments have been it's too burdensome, we  
14 don't have enough time, we shouldn't have to do that. But we  
15 don't have that issue now.

16 We think that those record custodians should be  
17 searched for because the defendants, as I said themselves,  
18 have indicated they have relevant and material documents.  
19 And I would just like to add that what is so odd to me,  
20 candidly, is when a case gets filed, a defendant, any party  
21 sends out a litigation hold on all of their documents  
22 wherever there may be throughout the company.

23 Here there was a litigation hold. They know who  
24 has relevant documents, but again they put us in a Catch-22  
25 as ha-ha, we gotcha, you're only limited to the custodians

1 that we have given you early on, which weren't even all of  
2 the relevant main players in the litigation. So I think  
3 we're entitled, candidly, to relevant material documents from  
4 those relevant material individuals.

5 THE COURT: Okay. Just so we don't get bogged  
6 down, I'll ask Mr. Posner, do you want to just talk about  
7 this? First of all, I have read your briefing, but can you  
8 just address the issue that you've only looked for documents  
9 from the custodians and not otherwise.

10 MS. GRIGSBY: This is Stacey Grigsby. I'm actually  
11 going to be addressing these arguments. That is incorrect,  
12 that assertion that we've only looked for documents from the  
13 custodians. And this is also covered with respect to the  
14 motion to compel. So there is the two issues. There are the  
15 central repositories which relator has brought up or  
16 centralized sources. And then in addition, there is just the  
17 linear custodial searches.

18 As we have told relator and has been written in our  
19 prior briefing, we have, in fact, looked for information from  
20 centralized sources such as relevant databases, so that is  
21 OEEOS, our review, our connect, viewpoint, and Janssen share  
22 drive. It is simply incorrect for the relator to allege that  
23 we have not looked at other types of documents.

24 What we have said is that we believe that most of  
25 the relevant documents would be generated by the custodians



1 and would be in custodial files. So I just want to kind of  
2 get into the substance of the argument. I think we need to  
3 take these things in turn. So the first thing that -- and  
4 the first premise that relator has in this entire motion is  
5 that now we are no longer in phase one. We're in phase two,  
6 which is this nationwide, broad reaching discovery. And  
7 they've even said that. They've said that we're in a  
8 different phase.

9 However, the Court as recently as October 1, 2021,  
10 made clear that it makes sense to be in phase discovery. And  
11 for the initial phase, which is the phase we're in about what  
12 Julie Long knew, to test the veracity of her allegations,  
13 should be finished and test that with summary judgment, which  
14 we are all looking towards.

15 So relator now has had document search for 23  
16 different custodians, and now they are saying that they need  
17 additional custodians. And we have added custodians as late  
18 as July 2021 in response to their prior argument that they  
19 did not have sufficient custodians, and that after reviewing  
20 our interrogatory responses they needed additional  
21 custodians.

22 The touchstone here is not whether there is  
23 possibly a document with another person that may potentially  
24 be relevant to the case, but we're guided by proportionality  
25 here. And I think it's important to look at the custodians

1 that the relator actually has. Some of these custodians were  
2 handpicked by the relator. The relator has Julie Long, other  
3 regional business managers, the regional business director,  
4 but not just that. Two regional business directors, and it  
5 actually goes up in the chain to custodians who have national  
6 roles. So they have the VP of immunology. They have the  
7 national director of gastroenterology. They have the HCC  
8 compliance director. They have a VP of sales and marketing.  
9 They also have the VP sales immunology, VP strategic customer  
10 group, the product director from side of care. Again these  
11 are national in scope. These are not just limited.

12 So here relator's allegation that there are all  
13 these people and they kind of are very very limited is just  
14 simply untrue. To the extent that now relator is looking for  
15 28 additional custodians, we would say that's wholly  
16 disproportionate in the light of the claims at issue and the  
17 defenses here.

18 It seems to be more of a fishing expedition. 51  
19 custodians total which is what relator is asking for isn't on  
20 par with the number of custodians in other types of massive  
21 multidistrict litigation. And we do not think it's  
22 warranted, especially in light of the fact that we are still  
23 in phase one, not phase two. We're still in what Judge  
24 Saylor has called the relator phase of the case.

25 THE COURT: Okay. Let me just say with regard to

1 the phase one and phase two, my understanding is that at the  
2 end of this, which I think Chief Judge Saylor would like to  
3 see sooner rather than later, that there will be a summary  
4 judgment motion. And what he does not want to see is that we  
5 have a lot of arguments over whether relator actually has the  
6 discovery she needs to do that motion. And then we're back  
7 to square one and back to more discovery.

8 So my goal here really is to just make sure that  
9 relator does have fulsome discovery on what she needs for  
10 this part of the case, whether you call it phase one or phase  
11 two, I do think you are headed to summary judgment. We don't  
12 want to see a bunch of claims at that stage that we can't  
13 litigate it because there's not enough discovery.

14 That's why I'm trying to strike some balance here  
15 so that relator has what she needs, and we're not going to  
16 end up just getting stuck there. But I do understand Janssen  
17 feels that it's given plenty of discovery.

18 So, Mr. Leopold --

19 MR. LEOPOLD: Your Honor, I don't want to go back  
20 and forth and back and forth, but since it's our motion, they  
21 responded, if I could have this brief rebuttal with whatever  
22 the Court would like to do. Just going to your last point, I  
23 do think it's very important because it seems like after  
24 every status conference or every hearing there is a complete  
25 disconnect between what the relator believes the discovery is

1       versus what Janssen believes the discovery is.

2               I think at the last status conference hearing with  
3       Judge Saylor was at least I believe was crystal clear both on  
4       the record that everybody came away with it, (A), Judge  
5       Saylor said everything is on the table for summary judgment,  
6       even everything, scienter, everything it may be. Number two,  
7       came away with everything is on the table, but it's limited  
8       to a geographical location of Pennsylvania, if you will,  
9       where the relator basically worked.

10              So essentially what we have is since there is a  
11       national program involved here, we essentially have, if I  
12       could use this analogy, we have a national case here. The  
13       country has happens to be the State of Pennsylvania is what  
14       we're looking at. So all discovery is on the table. They  
15       are going, and Mr. Posner stated it at the last hearing that  
16       we anticipate all issues, scienter, and whatever else is  
17       going to be on the table, and we're entitled to try and get  
18       the reasonable relevant discovery that would be all of those  
19       issues so that it is not delayed at the end of the day when  
20       we come back with an appropriate, I think it's Rule 56 to  
21       come back and open up discovery after they file their papers.

22              Judge Saylor did not want that to take place. He  
23       was pretty clear on that issue. So the bottom line is  
24       discovery is supposed to be a search for the truth, not a  
25       game of hide and seek. I understand that 23 or so custodians

1 may be a lot, but we didn't have all of these names. We  
2 didn't have all of these documents to be able to filter  
3 through and ascertain the high, relevant individuals such as  
4 Mr. Jimenez and other people who were the corporate leaders  
5 that started the program.

6 They have purposely, and I don't begrudge them for  
7 it, they're doing their job, but Janssen has purposely kept  
8 us and isolated us and put us in silos to try and keep us  
9 from getting those relevant pieces of documentation. They  
10 didn't even search two-thirds of the relevant people's  
11 documents in their files, whether you want to call it ESI or  
12 whatever we want to call it. They searched for, as I stated  
13 in my opening presentation, quote unquote, corporate  
14 documents and only a handful of ESI documents.

15 There are 20 or so, 15 or so additional individuals  
16 that all they have to do is go to their computers and run ESI  
17 searches. It may take some time, but that's what litigation  
18 is. And we shouldn't be prejudiced because they have refused  
19 or say it's too burdensome to do that.

20 THE COURT: Mr. Leopold, one of the things I have  
21 read and when I'm speaking with him heard Chief Judge Saylor  
22 really emphasize repeatedly is he wants to know about the  
23 program as it was rolled out in Pennsylvania and sort of  
24 pertaining to Ms. Long. I think the idea was for you to sort  
25 of test the waters, sure, in a thorough way, and for summary

1 judgment purposes with regards to those programs and that  
2 geographic territory. And I allowed the -- I ruled, I  
3 ordered that information going, as I called it, up the chain  
4 of command having to do with the formulation of these  
5 programs that were being rolled out in Pennsylvania and  
6 discussions about their legality, if they're not privileged  
7 and have to be turned over, and that sort of thing.

8 So I just want to make sure that you are limiting  
9 yourself in that way and that you're not -- A lot of the  
10 requests I'm seeing look like you want nationwide information  
11 about a program, like how much did you spend on this  
12 particular program nationwide. Go ahead.

13 MR. LEOPOLD: I appreciate your questions. I think  
14 it's very important for purposes of moving forward. I think  
15 we cannot lose sight of the fact that these are, quote  
16 unquote, and undisputed now when they filed their motion to  
17 dismiss, now it's undisputed these are national programs.  
18 These are also the 20 some odd programs, I think it was  
19 approximately 24 or 25 programs that, we have identified as  
20 core, main programs that we are focusing on are all programs  
21 that were in, and I want to emphasize, that were in the  
22 relator's territory.

23 So we are now going back and searching or hopefully  
24 getting, have gotten some, there are still some issues that  
25 we haven't gotten, about the beginning of these programs that

1 are isolated and focused just on the relator's area of  
2 Pennsylvania, how they started, when they started, the  
3 reasons behind they started, the focus of the programs, etc.  
4 Just in our focused bellwether region, if you will.

5 I understand that the original request talked about  
6 financial remuneration of these programs all around the  
7 country, but that was early on when we did the request. I  
8 agree that that request should be focused myopically on the  
9 financial remuneration just in the relator's territory. But  
10 how, when, why, who, what, etc., of the beginning of the  
11 program, how the program got started, the main people that  
12 got involved in the program, that, although it may be  
13 nationally, is the same issues for myopically in the  
14 relator's geographic location. There's no difference.

15 THE COURT: Okay. So I agree with you that very  
16 generalized information about how the program got started,  
17 etc., what you just said, that doesn't necessarily pertain to  
18 Pennsylvania is discoverable. And then how those programs as  
19 they work their way down the chain into Pennsylvania, how  
20 they operated and how much the company spent on them and that  
21 type of thing with regard to Pennsylvania is discoverable.  
22 So I want you to get that information before you hit the  
23 summary judgment phase.

24 MR. LEOPOLD: Your Honor, if I could just reference  
25 on that particular issue. It may be difficult. I don't know

1 if Janssen could do this, but if, for example, the way the  
2 programs worked is either they built the programs in-house or  
3 they had a company outside, Xcenda, do the PowerPoint  
4 presentations, the research, etc. They paid Xcenda millions  
5 of dollars for all of the work that they did. Xcenda did the  
6 work not knowing -- they did it for them nationally.

7 I'm not sure they can break the number up and parse  
8 out what the value of that was just for Pennsylvania. It  
9 might just be a global number. I think where the issue of  
10 the financial aspects comes in is just the physicians they  
11 gave the programs to in the Pennsylvania region and the  
12 values that those issues would be relator geographic  
13 specific.

14 MS. GRIGSBY: Your Honor, if I could just  
15 interject. I think there is a disconnect in what counsel is  
16 saying today and what the actual request is in the substance  
17 of the motion for reconsideration. And it seems like this  
18 might be the cause of some of this disconnect with the  
19 parties coming out of each of these hearings and having  
20 vastly different understandings.

21 So I heard relator say, relator's counsel say,  
22 that, you know, they want to be focused myopically on, you  
23 know, phase one and understanding how the program started,  
24 how the program came down, what happened in central  
25 Pennsylvania, which is relator's geographic territory, and an



1 acknowledgment that these would include some geographic  
2 limits. But if we're trying to match that in what they're  
3 asking for in reconsideration, so let's just take the  
4 custodians.

5 They're asking for several national custodians who  
6 did not start at the inception of the program. They would  
7 not necessarily have information how these different programs  
8 started. They would not necessarily be geographically  
9 limited. And our view is that other custodians could provide  
10 the information in terms of how the program operated in  
11 relator's geographic region.

12 So just to say that they're being myopically  
13 focused isn't the same as what is mapping onto the request  
14 that they're actually making here. So I think that obviously  
15 if relator had pointed out, okay, there is some person that  
16 are relevant to phase one, understanding the geographic  
17 limits, is nonduplicative who we have a good reason to  
18 believe was involved in the inception of the program, that's  
19 something we would consider. But that's not at all what  
20 they're asking for here.

21 THE COURT: I hear you, Ms. Grigsby, and I  
22 appreciate this. It seems to me one of the things, one of  
23 the kind of themes of relator's request is that they have  
24 felt for a while like they're kind of operating in the dark  
25 about who these people are, which ones are important, etc.

1 And I think this also dovetails with their complaint that  
2 they're getting some information from the custodians, but  
3 they're not getting information that seems to be from a sort  
4 of companywide document search, which I know you addressed  
5 very well a few minutes ago.

6 But I wonder if rather than having 28 more  
7 custodians, the parties ought to sit down together and  
8 Mr. Leopold ask precisely what he wants, and you point out  
9 the custodians instead of just having them kind of operating  
10 in the dark about this and doing this kind of scattershot  
11 approach. And maybe it won't be necessary to do all of the  
12 information from each of these custodians, but just to do  
13 more targeted searches. But I don't know, Mr. Leopold, what  
14 about that?

15 MR. LEOPOLD: Your Honor, I would like  
16 Mr. Preston, if he could, on the financial and that  
17 particular issue because he's been dealing with for a long  
18 time the ESI and custodian issue. Casey, do you want to  
19 chime in?

20 MR. PRESTON: Your Honor, I think we have a  
21 bellwether summary judgment process. At the local level in  
22 central Pennsylvania, the focus is on the delivery of the  
23 alleged kickbacks and the false claims that they were caused  
24 to be submitted. So the discovery related to what programs  
25 were provided and when they were provided, that's all

1 information that we're seeking, and we're trying to get all  
2 of that information. But what seemed to be sort of lost in  
3 the shuffle is these programs were designed, monitored, and  
4 implemented by management. And so what we're seeking is the  
5 managers who oversaw this program. People in marketing who  
6 developed these programs. People in sales who oversaw this  
7 program.

8 One of the elements of an anti-kickback claim, as  
9 you know, is we're going to have to show that Janssen knew  
10 that providing these free IOI support services was unlawful.  
11 So you're not going to get that by just focusing on Julie  
12 Long's documents. You've got to go to the documents such as  
13 the compliance personnel, the attorneys who performed these  
14 legal reviews, the senior managers who were responsible for  
15 making these decisions.

16 So, yes, we need to focus on the ABSes who provided  
17 these services in central Pennsylvania and the regional  
18 business managers that supervise them, but what's more  
19 important in the documents that are really central to this  
20 case are the documents held by managers, attorneys,  
21 compliance personnel. And that's what we really have only  
22 received a very small sample of those documents.

23 And Ms. Grigsby spent a lot of time about the  
24 efforts that Janssen has undertaken to collect documents from  
25 corporate repositories, but, Your Honor, in their briefing

1 they acknowledge there's hundreds of people that were  
2 involved in this scheme. It took place over approximately 20  
3 years, and there's been a lot of turnover with the company in  
4 some of these positions.

5 For them to just say, Sally Jones, we know she  
6 possesses a lot of documents, but we're not going to produce  
7 them because she's not one of the agreed upon custodians.  
8 That just completely turns discovery on its head. If they  
9 know that there's individuals that possess discoverable  
10 information and had significant involvement in this case,  
11 they've got to go and produce those documents. They can't  
12 just let them sit there.

13 So we're stuck in this position where we haven't  
14 received any of those materials. They have not collected  
15 documents from a single employee other than the custodians.  
16 And they talk about the ten custodians from the government's  
17 document request. Well, those were selected by the  
18 government. And, Your Honor, they are all field level  
19 witnesses from other territories. So they're documents,  
20 yeah, in some cases they're communicating with senior  
21 managers and those documents are helpful, but for the most  
22 part their documents relate to their interactions with  
23 physicians in other territories and are outside the scope of  
24 the bellwether summary judgment process.

25 So it's really the focus is on the 12 custodians in

1 this case and the relator, and that's all we have. So all  
2 the other marketing people and compliance people and  
3 attorneys such as Mr. Jimenez, who they've acknowledged  
4 provided legal advice regarding these services, they haven't  
5 produced any of their documents. And they haven't logged any  
6 documents that they're withholding on a privilege log. They  
7 just completely said they don't have to do that.

8 So when we are seeking 28 additional custodians,  
9 Your Honor, we need a lot of those custodians because we need  
10 to perform ESI searches of their electronic files. But  
11 Janssen also has to go to those individuals who it knows had  
12 significant involvement and produce the documents that they  
13 possess. They can't just sweep them under the rug and turn a  
14 blind eye to them. They exist, and they're important  
15 evidence that the relator is entitled to receive.

16 I want to address the financial reports. Yeah, we  
17 can focus on central Pennsylvania, but that's not -- Janssen  
18 when they create these financial reports, they're looking at  
19 this program nationally. So when their internal documents  
20 don't just say, okay, this is what we're going to do in  
21 central Pennsylvania, this is how much money we're going to  
22 spend in central Pennsylvania, they look at this program as a  
23 whole. So the reports, they look at how much they're  
24 spending on ABS salaries, how much they're paying outside  
25 consultants to develop and provide these programs to

1 physician practices.

2 So when we're limited to just say, oh, you can only  
3 receive those programs to the extent that they relate to  
4 central Pennsylvania, well, then that just basically says,  
5 okay, you don't get that relevant evidence because it's  
6 reported at a national level. That's prejudicial to the  
7 plaintiff. That's evidence that goes to directly the value  
8 of these programs and Janssen's intent in providing the  
9 programs.

10 THE COURT: Okay. Yes, Ms. Grigsby.

11 MS. GRIGSBY: Yes. I wanted to respond to a few  
12 things because there are a lot of categorical statements with  
13 which we would take issue. Again to the extent that relator  
14 now is claiming that we were aware of other relevant  
15 individuals who were involved in the program and we've had  
16 information on its inception, creation, and have just refused  
17 to search for it, that is not true.

18 What we have said is that we along with relator  
19 have agreed upon custodians. We believe that those  
20 custodians go all the way up the chain. And they are the  
21 most relevant custodians. It's difficult just to understand  
22 how relators can say, for example, Robert Gossmore, who is  
23 the vice president in immunology, the vice president of  
24 marketing, and the president of immunology is not in  
25 marketing, is not involved in sales, and is not involved at

1 the highest level. The same thing with Edmund Brenich, who  
2 was an associate director of marketing and then compliance,  
3 and he was the healthcare compliance director. These are not  
4 low level individuals who would not have either sales or  
5 marketing or compliance within their purview.

6 The same is true for Scott Habig who is the vice  
7 president of sales and marketing.

8 THE COURT: Do some of the custodians that have  
9 been chosen, were they only there for certain periods of time  
10 so that there's gaps in this information.

11 MS. GRIGSBY: Well, the custodian, for example,  
12 Scott Habig was there from 2000 to 2010. And for example,  
13 Greg Fenner who was the national sales director,  
14 gastroenterology was there from 1989 to 2008. So they  
15 actually do cover quite a large period of time. Certainly  
16 not all custodians cover all time, but it's just not the case  
17 that there are significant gaps.

18 And it's not clear that relator's list that their  
19 proposing of the 28 custodians is meant to either fill some  
20 kind of temporal gap. It seems to me like it is consistent  
21 with their view that this is now some nationwide phase of  
22 discovery, and they basically want to disrupt and blow open  
23 the current phase, which is focused on how these programs got  
24 started and then what happened in the central Pennsylvania  
25 region.

1 THE COURT: I don't really think they're doing  
2 that. I think they are correct that we are headed toward  
3 summary judgment concerning the programs that have been  
4 rolled out in Pennsylvania. And to that end, I think a lot  
5 of the things they're asking for such as how much were the  
6 programs worth, how much did they cost, how much did Janssen  
7 spend on them are really critical.

8 For example, if there's national reports that  
9 aren't broken down by region how much a program cost Janssen,  
10 then I think those national reports need to be provided. A  
11 lot of the information they're asking for I think they should  
12 actually get. And if they haven't gotten it yet, we'll just  
13 have to take some more time here. I hear you, but I don't  
14 think it's just the beginning of the program and exactly what  
15 was happening in Pennsylvania. I think there's more to it  
16 than that.

17 MS. GRIGSBY: And I did not mean to oversimplify  
18 their argument, but I think it's important to note really  
19 they are making a lot of these allegations in terms of what  
20 was provided in discovery and Janssen's refusal to provide  
21 them adequate information. I guess, the takeaway here is  
22 that we agreed upon custodians with the relator. We have not  
23 been hiding the ball. We've been conducting custodial  
24 searches and reviewing them not because we think that there  
25 are other custodians that were relevant and we are merely



1 withholding them, but because generally that is how now ESI  
2 discovery works.

3 The parties agree upon the important custodians.  
4 You do the searches, and those are the ones where you do the  
5 linear searches and look for search terms. We've also in  
6 addition to that looked at shared drives, which I noted in my  
7 initial statement and which relators completely ignored.

8 So I guess the problem here is that relators are  
9 really making a lot of these allegations, but that is their  
10 intuition. It is not -- They do not have a factual basis.  
11 In fact, they haven't pointed to documents or other types of  
12 information that would actually show that there is something  
13 that we are withholding from them. I can tell you today that  
14 we are not. We are not withholding it.

15 What we are trying to do is to define a reasonable  
16 scope of discovery such that we can reach an end, and that  
17 Janssen will not be searching millions and millions of  
18 documents just so that relator can find one additional piece  
19 of information. We provided them with 3 million pages from  
20 the 21 custodians in addition to these other corporate  
21 documents.

22 In terms of a resolution here, I think something  
23 that we would suggest is that relators perhaps get a discrete  
24 number of additional custodians, so like three or five. And  
25 we can discuss then what they need. And they are articulate

1 a specific reason why they need these custodians as opposed  
2 to this large net of saying they need 28 custodians from  
3 different time periods. And it's not clear to us at all why  
4 they believe that there's even a gap in the documents they  
5 have. It's not even clear to us that they've reviewed all  
6 the documents they have that we've produced to them.

7 THE COURT: Okay.

8 MR. LEOPOLD: Just to bring it to a closure and sum  
9 up and say we're not saying they've kept documents from us.  
10 They've limited the scope of the custodians that they have  
11 produced. Throughout their papers, and I've searched high  
12 and low for, and in their oral arguments that I've listened  
13 to on a number of occasions, I have not heard the reason why  
14 they don't want to do the rest of the custodians that we are  
15 requesting other than the fact is it's going to take some  
16 time to review the documents.

17 We don't have an affidavit saying it's burdensome.  
18 We don't have any evidence that it's going to be hard. They  
19 just don't want to the do it. We keep hearing about 3  
20 million pieces of paper. And I've gone through this before.  
21 At the core we're only talking about maybe 100,000 pieces of  
22 paper and less documents than that that are relevant because  
23 they haven't gone to the main people. That's all we're  
24 seeking. Let's just get to the main corporate people that  
25 were involved. Those people's documents have not been

1 searched. There's no prejudice to them other than the fact  
2 that they may have to do some extra work to review the  
3 documents.

4 THE COURT: Okay. So let's -- I'm going to take  
5 that under advisement. And let's move on to Janssen must be  
6 required to produce all requested discovery that post dates  
7 February 2016. And I know Mr. Preston had argued this  
8 before. I don't know if he's going to argue it again.

9 I am aware of Judge Saylor's order, Mr. Preston, on  
10 the Rule 30(b)(6) witness. If I were to revisit this, would  
11 you have to redo that deposition?

12 MR. PRESTON: No, Your Honor. That deposition has  
13 not yet taken place. Obviously I don't want to speak for the  
14 Court, but we obviously have this issue pending before the  
15 Court. And it appears from Judge Saylor's order concerning  
16 the 30(b)(6) that he was making a decision based on the  
17 rulings that were in place at that time. So I guess it's our  
18 position that this is an issue we still believe should be  
19 reconsidered.

20 THE COURT: Okay. So can you just succinctly  
21 revisit that argument. I don't have your prior motion in  
22 front of me, but you had very limited number of the programs  
23 that you were asking for post dating 2016, as I recall.

24 MR. PRESTON: Yeah, Your Honor, just to summarize,  
25 this is an ongoing fraud. The relator left Janssen's

1 employment in February 2016, and that was the artificial cut  
2 off to save some burden that was imposed. But discovery has  
3 shown and Janssen's counsel has acknowledged that many of the  
4 programs continued after the relator left Janssen. In fact,  
5 some of the programs continued long after the plaintiff left  
6 Janssen.

7 So these are alleged kickbacks that are causing the  
8 false claims at issue. So to just take a block of time where  
9 the alleged misconduct is still occurring and say the  
10 plaintiff doesn't get to take any discovery of that, that's  
11 completely prejudicial. And those are claims that are part  
12 of our case.

13 In addition, sometime in around 2017 is when  
14 Janssen learned about the plaintiff's allegation that these  
15 services constitute kickbacks and are causing false claims to  
16 be submitted. The relator is entitled to know what Janssen  
17 did in response to these allegations. Did it change its  
18 conduct? Did it not do anything at all? And that goes  
19 strongly to the scienter obligation that we have in this  
20 case, what happened during that time period.

21 And, in addition, the government conducted an  
22 investigation of Ms. Long's allegations, and we don't know  
23 the full extent of that investigation. But Judge Saylor in  
24 his order on December 1 said that's information that we're  
25 entitled to learn about. And he denied Janssen's request for

1 a protective order over all of the interactions that took  
2 place during that time. So it's just completely prejudicial  
3 to cut off the plaintiff from receiving any documents that  
4 are responsive to her document request just because these  
5 documents originated after February 2016.

6 It's not a bald allegation anymore. These are  
7 confirmed, verified facts that they're continuing to provide  
8 some of the programs that are alleged to be kickbacks in this  
9 case.

10 THE COURT: And do you have cut-off date? If it's  
11 after February 16, it's until what date?

12 MR. PRESTON: Your Honor, I'll go back to that  
13 letter that was filed with the Court and is ECF 189-3. It's  
14 a letter from Janssen's counsel that was essentially a  
15 supplemental interrogatory response. And it's from  
16 August 11, and it lists several of the programs that are at  
17 issue in this case. There's a few of them that as of August  
18 2011 they acknowledged are continuing to be provided.

19 So I think the volume of documents probably narrows  
20 as you go. Some of these has Janssen stopped providing some  
21 of these services? For example, according to their letter  
22 the program considerations for proactive practice management,  
23 it stopped providing that program in August 2017. So I would  
24 assume that the documents related to that program, probably  
25 there's not much after that. But with regard to the infusion

1 services review or also known as the IBIZ, that program, in  
2 their letter they state that's still being provided. So we  
3 should continue to receive relevant documents that are  
4 responsive to our requests related to that program.

5 THE COURT: Just as long as the litigation  
6 continues?

7 MR. PRESTON: Yes, Your Honor. Essentially it's an  
8 ongoing fraud.

9 THE COURT: Okay. Ms. Grigsby.

10 MS. GRIGSBY: Your Honor, if I may respond. I  
11 think we've said it a few times. But this is completely  
12 contrary, one, to phase one; and two, it's not even clear how  
13 this relates to liability determination in phase one. On the  
14 first point, we know that Ms. Long left in 2016. And if the  
15 whole point of phase one is to determine what she knew, to  
16 test her allegations themselves, then 2016 onward is  
17 irrelevant.

18 In addition to that, I know that Mr. Preston noted  
19 that there might be something that is probative about, you  
20 know, what Janssen continues to do if it's a kickback. I  
21 guess the question to ask is what additional information can  
22 be learned. If the allegation is and we're looking at the  
23 programs that happened during Ms. Long's time at Janssen,  
24 then whether it's a kickback or not would depend on whether  
25 they were a kickback during that time. It's really

1 irrelevant whether in 2016 that Janssen is continuing to  
2 provide it or not. It's completely continuous. So it's not  
3 clear what further information will be learned.

4 And then Mr. Preston also noted that the  
5 government's investigation occurred in 2017, and that that is  
6 also relevant. I mean, I think we all know this, but the  
7 government ultimately declined to intervene in this case. So  
8 the marginal probative value of anything related to even the  
9 time after the government investigation is low because  
10 Janssen again had no reason to believe that these programs  
11 themselves were, in fact, kickbacks.

12 What it appears to be is relator is trying to  
13 figure out with respect to damages and issues that are not  
14 necessarily unique to this phase one. It's just any  
15 particular use that they would have for the materials from  
16 2016 onward they could also find in that earlier period of  
17 time that goes from 2006 to 2016 and then some time earlier.

18 And then the last point that I would like to make  
19 is, you know, relator's argument that this is really just  
20 kind of minimal and it's just adding on. That that's six  
21 additional years of discovery that relator now is requesting.  
22 And that six additional years would obviously take a number  
23 of documents which have marginal documents to phase one. And  
24 the effect would be postponing the end of discovery for  
25 months. This is not an inconsequential period of time. And

1 really anything that relator is looking for has minimal to no  
2 probative value with respect to the phase one liability  
3 phase.

4 MR. POSNER: Your Honor, one other point. It's  
5 difficult to envision that after the United States Justice  
6 Department and HHS investigated these issues, they didn't  
7 just decline to intervene. They obviously didn't make any  
8 statements about stopping payment. There's no way there's  
9 going to be liability. We have a lot of materiality defenses  
10 that predate 2017, which we'll raise, and a lot of government  
11 discovery we are seeking prior to '17.

12 But if Your Honor is going to open up the time  
13 period, then we're going to seek very very significant  
14 discovery from the United States through that time period.  
15 There is just no way that there can be liability after the  
16 government's investigation commenced. So we would just ask  
17 you to keep that in mind when you're thinking about extending  
18 the time period.

19 THE COURT: I'm sorry. You said if the time period  
20 is extended, you would seek additional discovery from the  
21 United States?

22 MR. POSNER: We're already seeking discovery from  
23 the government. We were prepared to predate October of 2016.  
24 And we will likely have a number of issues to bring to the  
25 Court about government discovery. But certainly I don't



1 understand how there's going to be liability after the  
2 government declined and knew about the programs and took no  
3 action.

4 Under the case law, it's not that the document has  
5 probative value, there's going to be enormous liabilities  
6 hurdles. We'd ask you to keep that in mind. But if you're  
7 going to open up the time period post 2016, well then  
8 obviously the government discovery becomes even more relevant  
9 post that period.

10 We were prepared to limit it to October 2016 and  
11 back of where there's a lot of government knowledge and a lot  
12 of materiality issues. But if you're going to extend  
13 forward, then the government's stuff is going to extend  
14 forward.

15 THE COURT: Just a minute, Mr. Leopold. When you  
16 say the government discovery, you're talking about  
17 discovering from the government the reasons why they decided  
18 not to prosecute?

19 MR. POSNER: No. I want to know what the  
20 government knew and when they knew it about all of these  
21 programs over the years. That's what I want to know.  
22 Whether we get a declination memo, I want to know what did  
23 HHS and DOJ know about these programs over the years.  
24 Clearly under the Supreme Court's decision in *Escobar* and  
25 related cases, that is a very material issue. So if you're

1 going to open up discovery post 2016, I want to know what the  
2 government knew and when it knew it. When I say the  
3 government, I just don't mean the Justice Department.

4 MR. LEOPOLD: If I can respond --

5 THE COURT: No, no. Just a minute, please. So  
6 what about the fact that if the allegation is this is an  
7 ongoing fraud, then just because Ms. Long left doesn't mean  
8 that there isn't discoverable information about the program  
9 that happened after she left.

10 First of all, I guess you should just seek all the  
11 information from the government you can about why they  
12 declined. I think the government declines these kinds of  
13 cases for a lot of reasons. You should.

14 With regard to the ongoing nature of the fraud,  
15 this bothered me after the first hearing just thinking, well,  
16 the fact that she's claiming, okay, even if we want to call  
17 it phase one here, these programs were violating the statute,  
18 and then I happen to leave in 2016, and then they continued  
19 to violate the statute. Why isn't the information after she  
20 leaves also -- why isn't it discoverable?

21 MR. POSNER: As Ms. Grigsby said, it's an issue  
22 about proportionality. It's going to fail because of the  
23 materiality defenses. But, Your Honor, it's a  
24 proportionality issue. The District Court, as we all  
25 acknowledge, what happens in Long's district, what did Long

1 know, so why not stop it when she left.

2 THE COURT: That's why I limited it. I just  
3 thought let's just take this slice of time and see. But on  
4 reflection, it does seem to me if something important  
5 happened the month after she left and it has to do with the  
6 very same program that she's complaining about -- well, I  
7 don't know. But I hear you. I know what you're saying. I  
8 do think proportionality is the strongest argument. Just  
9 we've got to terminate this at some point.

10 MR. POSNER: But, Your --

11 THE COURT: Let me just hear from Mr. Preston.

12 [Cross-talk.]

13 THE COURT REPORTER: Counsel, please. One person  
14 at a time. And do not interrupt the Judge.

15 THE COURT: Thank you. Thank you very much, and I  
16 appreciate your support. Let me hear from Mr. Preston.

17 MR. PRESTON: Your Honor, I apologize if I  
18 interrupted you. First of all, I think Mr. Posner's  
19 statements concerning the law and materiality and the context  
20 of an anti-kickback statute violation is way off base. He  
21 has been free to pursue whatever discovery he wants from the  
22 government. But to make a threat that if we're giving the  
23 discovery we're entitled to that somehow they're going to  
24 unleash more burdensome discovery on the government is just  
25 completely inappropriate.

1           Setting that aside, as Your Honor recognizes,  
2           there's a lot of reasons why the government doesn't intervene  
3           in a case. The government also, as Your Honor knows, if it  
4           believes that the case doesn't have merit, then the  
5           government can seek to dismiss it. The government did not do  
6           that here. This is a case that has substantial merit, and  
7           the evidence is supporting that.

8           When we're looking at the evidence that post dates  
9           February 2016, this is some of the most probably telling  
10          evidence that we're going to take a look at. And what was  
11          the reaction when Janssen learned that they basically had  
12          been caught, that somebody blew the whistle on them that they  
13          were providing these services? And this is an issue that  
14          goes far beyond central Pennsylvania. This is what was  
15          happening at the management level.

16          Again with regard to the scienter element, that is  
17          largely discovery that is all going to come from management,  
18          compliance, and Janssen's counsel. It's just completely  
19          prejudicial if that is taken out of the case and we're not  
20          allowed to use that to defend against summary judgment.

21          I'd like to ask the Court, once there is a summary  
22          judgment process, then do we go back and take more discovery  
23          in order to prepare for trial? Really we should be in a  
24          position where discovery is complete at the management level  
25          and with whatever level advice and legal evaluations we are

1 going to see or learn about, that should all be complete by  
2 the time of the summary judgment process. It shouldn't be we  
3 just get some of that and then after summary judgment we get  
4 more, or as part of the summary judgment process we get more.

5 Really, the case should be ready for trial at that  
6 point. Otherwise this is completely inefficient to just do  
7 sampling of evidence. What Judge Saylor has explained is all  
8 the issues -- discovery should be complete except at the  
9 field level. We don't need to know the specific interactions  
10 between ABSes and physicians in California with regard to the  
11 field level, discovery should be complete in central  
12 Pennsylvania. But at the management level, headquarters  
13 discovery, that discovery should be complete.

14 THE COURT: I think I've heard enough on this. I'm  
15 going to take it under advisement. I think you've already  
16 settled the promotional review committee records that predate  
17 October 2009. I don't think there's anything left there.

18 MR. LEOPOLD: Just one issue. We've been advised  
19 that they are gathering the information and the materials.  
20 We would just like instead of having an open date, some time  
21 in January they claimed they were going to get it to us, we  
22 would like a date certain. But to have it a little bit  
23 open-ended I think is not the right way. If we can get a  
24 specific day, whether it's January 10 --

25 THE COURT: Ms. Grigsby?

1 MS. GRIGSBY: So, Your Honor, I think as you  
2 mentioned before, these are paper files in boxes. And really  
3 over the holiday and just looking at the team, we do not have  
4 a date certain to review the hundreds of boxes. Certainly  
5 we're expediting it, and this is our first priority in terms  
6 of things to wrap up in discovery.

7 THE COURT: How about January 15?

8 MS. GRIGSBY: I think January 15 may be difficult.  
9 I guess if we could ask for the Court's indulgence to file a  
10 further status next week, which I realize is the week between  
11 Christmas and New Year's, such that we can really provide  
12 some more detail in terms of how far our ability is because  
13 first we have to retrieve the document boxes --

14 THE COURT: Since the time we've already spent is  
15 about a fraction of what we never to recover. So with regard  
16 to that, why don't you just figure out how much time you want  
17 and confer with the relator. And if you can't agree on a  
18 date, I guess Judge Saylor doesn't like letters on the  
19 docket. I learned that. So just file a status report  
20 setting out the issue, and I'll pick a date for you if you  
21 can't agree on one.

22 MS. GRIGSBY: Yes, Your Honor.

23 THE COURT: All right. So how about the discovery  
24 concerning scienter?

25 MR. LEOPOLD: Yes, Your Honor. Again as noted by

1 Judge Saylor, everything is on the table. Mr. Posner is  
2 dogmatic that that is going to be an issue in summary  
3 judgment. And up until now they have fought against us  
4 getting any discovery along those lines.

5 THE COURT: So what you're actually talking about  
6 is discovery of legal advice and any legal reviews or  
7 analyses?

8 MR. LEOPOLD: That's right. And they have refused  
9 to even identify any documents on those issues, particularly  
10 Mr. Jimenez who was intimately involved. They haven't even  
11 listed his documents on a privilege log which is respectfully  
12 inappropriate. They haven't gone to other locations to  
13 identify any documents. If they're privileged they need to  
14 state it with specificity.

15 Now, I don't know what's going to happen tomorrow.  
16 It sounded like Janssen is going to be of a view that they  
17 are not relying on advice of counsel. That opens up a whole  
18 can of worms on other issues. And I think the case law is  
19 pretty clear that they can't have their cake and eat it too,  
20 and that still opens the door to a lot of issues. We'll  
21 address that if that's their ultimate decision. But I think  
22 certainly scienter is a core issue. It's one that they have  
23 raised and said that they are going to be arguing on summary  
24 judgment. We're entitled to get full and complete discovery.

25 THE COURT: I'll hear from defense. I don't know

1 who is arguing that.

2 MS. GRIGSBY: Yes, Your Honor. So Janssen has  
3 never refused to provide documents related to scienter. And,  
4 in particular, we've talked about the materials for  
5 promotional review committee, which we have provided and are  
6 continuing to provide to relator. One thing, I think that  
7 relator has previously said that the focus of their  
8 discovery will mainly be on management's intent in providing  
9 these business services to the account as well as a knowledge  
10 of that service violating the anti-kickback statute. They  
11 should be specifying that information in response to our  
12 custodial documents.

13 They've brought up a number of times and this kind  
14 of melds with the argument about the privilege log that  
15 Janssen is refusing to log documents or even search  
16 documents. To the extent we are performing custodial  
17 searches and have searched other repositories, we are indeed  
18 logging all of these documents. They've brought up Freddie  
19 Jimenez in particular. The reason why Freddie Jimenez's  
20 documents are not being specifically searched and logged,  
21 rather to the extent we find them in other custodial  
22 documents is because Your Honor has specifically ruled that  
23 Freddie Jimenez would not be added as a custodian. Freddie  
24 Jimenez is an inhouse lawyer for Janssen. He is not the  
25 person returning the program. He was not involved in the



1 inception of the program. So Your Honor specifically denied  
2 adding Freddie Jimenez.

3 And the reason is because you noted that the  
4 purpose of adding him would be to generate a rather lengthy  
5 privilege log. So I see relator disagrees here, but it's  
6 just not the case that we are again running into privileged  
7 documents and not marking them and not putting them in our  
8 privilege log. That's a separate argument. And we are not  
9 withholding evidence of intent.

10 I guess the question is what specific discovery do  
11 relators think that they do not have based on their very  
12 broad discovery requests that we have not responded to.  
13 Because, you know, in principle and in theory, they can say  
14 they've been denied this discovery, but it's not clear how we  
15 failed to respond to any one of their requests beyond the  
16 limits that we've already been arguing about at some length  
17 this morning.

18 THE COURT: I guess regarding the scienter -- First  
19 of all, I think scienter is in play at the motion for summary  
20 judgment that's upcoming. And I think what you need to do is  
21 produce nonprivileged information about any legal advice you  
22 got or any legal reviews or analyses you performed or  
23 received. Now, whether that means you produce, I don't know,  
24 Mr. Leopold, whether they produce thousands of pages of  
25 privilege logs or they just search themselves for

1 nonprivileged documents, I don't know how you're going to  
2 claim a privilege if you don't have a log. But it does seem  
3 to me it could be really overwhelming. I'll hear from you.

4 MR. LEOPOLD: I think, first of all, we have to  
5 take a step back. I think what Ms. Grigsby has argued just  
6 now is the perfect example of putting us in a Catch-22 which  
7 is, well, Mr. Jimenez has documents that are relevant  
8 material. They may go in a privilege log, they may be  
9 produced, but he's not one of the custodians. So therefore  
10 we didn't search him. We're not going to tell you what they  
11 are, and we're not going to put them on a privilege log,  
12 number one.

13 Number two, Janssen has lost sight of the fact that  
14 on April 23 Your Honor specifically ruled that all legal  
15 analyses are both highly relevant, material, and should be  
16 produced. Yet to date Janssen has ignored that order, has  
17 not produced any of these pieces of information, has not  
18 logged any of these pieces of information or documents. And  
19 I think we're clearly entitled to it.

20 Litigation is burdensome, Your Honor. We're not  
21 dealing with a company that's not used to being involved in  
22 litigation. They've hired one of the largest --

23 THE COURT: Okay. We have to kind of get to the  
24 point here. I think what I said about not searching and  
25 producing a privilege log for Mr. Jimenez earlier had to do

1 with an argument where we were talking about limiting a  
2 number of custodians, getting through that discovery. It  
3 wasn't clear at that time that we were headed for summary  
4 judgment. And I just didn't think it was useful to have one  
5 of the custodians be someone the vast majority of whose  
6 communications were going to be deemed to be privileged.

7           However, at this stage I do think Janssen needs to  
8 hand over relevant legal advice and legal reviews and  
9 analyses that Janssen performed or received that are not  
10 subject to a claim of privilege. And I don't know if it  
11 makes sense even here to make Janssen produce what's going to  
12 be an incredibly voluminous privilege log. So that's what I  
13 asked you to address, Mr. Leopold.

14           MR. LEOPOLD: Your Honor, all I can say is I think  
15 a party has a duty and responsibility when they are searching  
16 through documents to produce documents that are not  
17 privileged. And if they believe there is privilege under the  
18 rules to provide a full and complete privilege log. I am not  
19 aware of any exception that says they're not to do that,  
20 burdensome or otherwise.

21           THE COURT: I just think for them to conduct for a  
22 period of 20 years, or however long we're talking about, a  
23 nationwide search for legal analyses, etc., of these 37  
24 programs and also produce a privilege log is going to take a  
25 long, long time.

1 MR. LEOPOLD: But Your Honor, if they're going  
2 through the documents to make that determination, they have  
3 to review the documents. They're going to be doing that and  
4 producing nonprivileged documents. I don't understand what  
5 the added burden is on also setting forth in an appropriate  
6 privileged log what the documents is, to who and from, and a  
7 brief sort of note about what the document is. They have to  
8 do that anyway because they have to go through the documents  
9 to determine what's to be produced.

10 So I don't see what the extra burden is. That's  
11 generally the way it works with a privilege log.

12 MS. GRIGSBY: Your Honor, can I just interject?  
13 Mr. Leopold has represented the process that we are  
14 undertaking. We are producing a privilege log to the extent  
15 that we review privileged material, deem it's responsive, and  
16 see that it's covered by privilege. What we're seeing right  
17 now is that we are not conducting independent custodial  
18 searches of the company's attorneys in order to generate a  
19 privilege log.

20 For example, let's use the PRC materials. To the  
21 extent we review the PRC materials, there were attorneys  
22 involved in the PRC process. To the extent the attorneys are  
23 making themselves making comments as part of the promotional  
24 review committee, that is reflected on our privilege logs.  
25 So just for him to make the allegation that we somehow have

1       been collecting privileged materials and then have not been  
2       putting them in a log, that is not accurate. We've been  
3       logging the materials as part of the searches as we've  
4       described just during this conference and then all the  
5       correspondence and motions that you've read.

6               THE COURT: So can I just ask you -- Thank you,  
7       Ms. Grigsby. Can I just ask you, Mr. Leopold, what kind of  
8       legal advice and legal reviews or analyses do you think would  
9       not be privileged?

10              MR. LEOPOLD: Well, I think that there might be  
11       documents that are related to knowing, for example, that  
12       these are potential problems in terms of programs, we  
13       recommend that you not do certain things. That in a Qui  
14       Tam-type of case, kickback case like this, I don't believe  
15       that that is privileged. If they know that they're doing  
16       something illegally, that is not appropriate to prevent the  
17       documents from being produced. It's the core issue in the  
18       litigation.

19              So those are the types of documents, for example,  
20       as one example that would not be privileged.

21              MR. PRESTON: Let me provide a little bit more  
22       information. Your Honor, I think first of all, you're  
23       hearing about sort of selective disclosure of legal advice.  
24       They're talking about the promotional review committee.  
25       There were some lawyers on that committee. This is exactly

1 where it's inappropriate to say, oh, these lawyers approved  
2 it, but we're going to withhold all the other legal advice  
3 and you can't see that. That's contrary to the law. The  
4 documents show their own internal policy documents talk about  
5 how their legal department had to do separate reviews of  
6 these programs before they could be provided.

7 There's this assumption that there was all kinds of  
8 legal advice. Your Honor, we don't even know that. For all  
9 we know Janssen just turned a blind eye to all of these  
10 programs, reviewed it early on, and then never came back and  
11 revisited. We're entitled to know, and this is why it's  
12 important to have a privilege log, we're entitled to know  
13 what legal reviews they did. Even if we can't see the  
14 substance of the reviews, we're entitled to know, in fact,  
15 they actually undertook a legal review or whether they just  
16 completely acted recklessly.

17 We're entitled to know approximately when they  
18 undertook these reviews. So just to assume that it would  
19 result in a thousand-page privilege log, we don't know that,  
20 just because they can't withhold documents on a claim of  
21 privilege and also not give us any type of privilege log to  
22 allow us to assess what type of reviews and analyses took  
23 place. Otherwise, we are going to come back to the Court at  
24 summary judgment and say, Your Honor, when they're claiming  
25 that they acted in good faith, you know, we need to know who

1 they got advice from, when they got advice, what type of  
2 reviews took place. That's just in a case where one of the  
3 elements of the claim as it is in a kickback case, did they  
4 know they were acting unlawfully. That is an element of the  
5 claim.

6 So by the nature of this type of claim, their legal  
7 reviews are at issue in this case.

8 THE COURT: Okay.

9 MR. PRESTON: We really need a privilege log, Your  
10 Honor.

11 THE COURT: Okay. I hear you. Let's finish up. I  
12 think that's all we're going to do this morning on the  
13 documents responsive to requests for production number 20.  
14 So I'll hear relator.

15 MR. PRESTON: Your Honor, I think we covered that  
16 one earlier. This is a request for production that the Court  
17 recognized was relevant during an earlier motion to compel,  
18 but Your Honor thought that this was the type of information  
19 that could be postponed until a later date not knowing that  
20 the scienter issue and all of these issues were going to be  
21 teed up for a summary judgment motion. And this is the type  
22 of information where again it's at the national level.

23 If Janssen has these reports and it can tell us  
24 what it spent on ABSes and what it spent on outside  
25 consultants, providing the support and the amount it paid for

1 dinners and lunches furnished in connection with providing  
2 that support, if they can report it in a report for central  
3 Pennsylvania, then we take that. But they don't normally  
4 break down their monitoring these expenses and investments in  
5 a major marketing program. I'm on just one territory. The  
6 information is kept at the national level.

7 THE COURT: Okay. Let me hear Janssen on that.

8 MS. TREMONT: Good morning, Your Honor. This is  
9 Sarah Tremont. I'll address that issue. I think that the  
10 nature of the request is quite clearly encompassing national  
11 level information that has little relevance to the services  
12 being provided in central Pennsylvania. If you look at the  
13 actual texts, RFP 30020, which I think is a little different  
14 than what relator's counsel is saying now. They're asking  
15 for amounts spent on dinners and lunches furnished to  
16 accounts all over the country.

17 They're asking for business manager and ABS  
18 compensation. A very very very large majority of is all  
19 spent outside of the region. And they haven't articulated  
20 why this is relevant. They're speaking about value. But I  
21 don't see how that is relevant to relator fees of the  
22 discovery. If anything, it's going to speak to damages. And  
23 we're just not at that point in the case. And this  
24 information is not important to address the issues that are  
25 before the Court in the current phase of discovery.



1 THE COURT: First of all, what about their getting  
2 information that's national unless you have it broken down  
3 for central Pennsylvania? And then secondly, on whether it's  
4 relevant. Isn't it relevant as to the value of the services  
5 as to whether it constitutes a kickback or it's just de  
6 minimis? It sound like dinners and luncheons might be such a  
7 thing. But maybe if you add it all up, it's very valuable.

8 MS. TREMONT: Sure, Your Honor. To take the second  
9 point first, the, quote unquote, value of the services have a  
10 specific meaning under the anti-kickback statute. The amount  
11 that Janssen internally is spending in relation to employees  
12 that it is hiring and maybe other things that it's spending  
13 for is not the same as saying that these services have that,  
14 in fact, all the value under the anti-kickback statute. That  
15 depends on other factors and really is focused on the value,  
16 if any, that physicians receive from these services separate  
17 and apart from the value in relation to the drugs at issue.

18 That is not what is going to be shown by this  
19 national level information. So that's point one. And then  
20 on the point to whether this is kept by the company at the  
21 national level, whether it can be broken down into central  
22 Pennsylvania, we'd have to take that under advisement, Your  
23 Honor. I'm not prepared to addressed today specifically the  
24 performance information event. The request itself is for  
25 national level information.

1 THE COURT: Good.

2 MS. TREMONT: If it's narrowed to records about  
3 money that's being expended in central Pennsylvania, I  
4 suppose we could look for that. But I also think that would  
5 be reflected in the custodial documents that they've received  
6 from relator herself and everyone in her immediate  
7 supervisory chain throughout the entire relevant period of  
8 October 2006 to February 2016. So they have information  
9 about expenditures in the region.

10 THE COURT: Let me hear from relator.

11 MR. PRESTON: Your Honor, again, what we're looking  
12 for is roll-up financial information. These are  
13 sophisticated companies. They monitor their expenses. The  
14 expenses, the amount they invested in this major marketing  
15 program is certainly relevant to the value of the program.  
16 And we shouldn't be put in the position where we've got to go  
17 and take a thousand different pieces of paper and try to come  
18 up with some analysis as to what they spent in central  
19 Pennsylvania when Janssen has roll-up information in their  
20 financial department.

21 And if they can provide the roll-up for what they  
22 spent on paying outside consultants to provide these services  
23 in Pennsylvania, that's relevant. In fact, Your Honor, I  
24 believe back in the initial motion to compel, you instructed  
25 them to do that. They haven't done it.

1           THE COURT: Can you just outline for me why is it  
2 relevant to the value of the program given what was just  
3 said?

4           MR. PRESTON: Your Honor, this is a major marketing  
5 strategy that was taking place over 20 years. And they're  
6 arguing that these services had no value. Yet they invested  
7 a lot of money in providing these services. Not only paying  
8 the salaries of ABSes who focuses on providing these services  
9 but on paying the fees of outside consultants to provide  
10 these services.

11           So it is relevant. It's not the sole piece of  
12 evidence related to the value, but it's certainly a relevant  
13 factor in our argument as to the value of these services.

14           THE COURT: Okay.

15           MR. POSNER: Your Honor, can I just real quickly  
16 raise two housekeeping matters? One is in reading their  
17 opposition papers to the motion to compel production of  
18 documents and a privilege log, there are a few requests for  
19 productions, for example, 4 and 34, where they say they are  
20 still searching for documents and will produce them.

21           If we can just tack on to what Your Honor said  
22 earlier about the PRC hard documents. If they can advise us  
23 on a date certain when those searches will be complete and  
24 give us a timeframe, we can talk about that. But I'd like  
25 that included in that if we could instead of keeping it

1 open-ended.

2 And then the other issue is it's taken quite some  
3 time to get some job descriptions. We have Ms. Trahan and  
4 Ms. Heckman who are two major players set for deposition I  
5 believe on the 14th of January and then a week later. And in  
6 addition, so we don't have to come back again, we've been  
7 requesting not only the job descriptions, which I believe we  
8 got on Friday night, if I'm not mistaken, but also each of  
9 their job performance materials because that's relevant  
10 material also for their depositions. And we haven't gotten  
11 those.

12 We would just ask for those two individuals right  
13 now to get their job performance reviews so that we can go  
14 over them with them during the course and scope of their  
15 sworn testimony.

16 THE COURT: So you got the job descriptions?

17 MR. LEOPOLD: Yes.

18 THE COURT: You're saying you want the job  
19 performance materials. What about that? Ms. Grigsby or  
20 whoever is --

21 MS. TREMONT: I can respond on that, Your Honor.  
22 With respect this is not something that's covered by their  
23 first or second set of RFP's. Their request for job  
24 performance valuations that are covered by the RFP's were  
25 Ms. Long only within the scope of phase discovery. If

1 they're now asking for these materials, that's an entirely  
2 new request. And it's not anything that's teed up or ripe  
3 for decision by the Court today.

4 THE COURT: I think I'm just going to order you to  
5 give them their job performance materials. Let's just get  
6 that done. Why don't we do this: Let's say by January 10  
7 I'll ask the parties to file a joint status report on the  
8 status concerning the paper documents that Ms. Grigsby was  
9 saying everyone will have to go through. I hope to learn  
10 from the status report how long it will take. And if there  
11 is a dispute about how long it will take, what each party  
12 would like for regarding a date.

13 And if you just can't get the job performance  
14 materials to relator before the deposition, then you can talk  
15 to them about that. But if you can, I would like you to get  
16 it to them let's try to do that by January 10 as well.

17 And then with regard to the request 4 and 34, that  
18 you're still looking for other documents in the second  
19 motion, let's have a little report on -- a brief report on  
20 that on the January 10 status report as well. I know we're  
21 missing another whole motion here, and I'm going to schedule  
22 something after the January 1 for that. Hopefully the first  
23 week of January. And we'll go through that. I didn't  
24 realize it would take so long to get through this today. But  
25 we'll take that motion up. And in the meantime if after

1 Janssen notifies relator concerning the advice of counsel  
2 defense tomorrow that changes anything with regard to the  
3 outstanding motion, or you for whatever reason are able to  
4 narrow the issues in the motion, please file something prior  
5 to whatever date we have a hearing.

6 And I'm assuming Chief Judge Saylor will refer the  
7 two new motions to me as well, but we'll see. I think  
8 there's two more on the docket that the time for reply has  
9 not come up yet. So okay. And I think we'll try to just get  
10 through all of this in January. And then Chief Judge Saylor  
11 will see where you are with regard to how much time you need  
12 for more discovery, if you're appealing any of this.

13 I think you could probably safely wait and we'll do  
14 it all at once. So I hope you'll all just stop working on  
15 this case for a couple of days now and take a break. And  
16 we'll all get back to work in January on it.

17 MR. LEOPOLD: Thank you for your time, Your Honor.

18 THE COURT: I'm going to put this on the docket  
19 today, and then we'll take up the rest of it after the  
20 holidays.

21 (Court recessed at 12:29 p.m.)  
22  
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**CERTIFICATION**

I certify that the foregoing is a correct  
transcript of the record of proceedings in the above-entitled  
matter to the best of my skill and ability.

/s/ Joan M. Daly

January 14, 2022

\_\_\_\_\_  
Joan M. Daly, RMR, CRR  
Official Court Reporter

\_\_\_\_\_  
Date